Supreme Court, U.S.
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No. 02-287

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY LEE HUNT,
Petitioner,
v.
R.C. LEE, WARDEN,
CENTRAL PRISON,
RALEIGH, NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

I. **IS THE COURT OF APPEALS' DISPOSITION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS?**

II. **IS THE COURT OF APPEALS' DISPOSITION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN CONFLICT WITH DECISIONS OF THIS COURT?**

III. **DID THE COURT OF APPEALS UTILIZE AN OVERLY NARROW STANDARD IN CONFLICT WITH DECISIONS OF THIS COURT WHEN IT RULED THAT CONVERSATIONS BETWEEN ONE OF THE VICTIMS AND POLICE OFFICERS WERE NOT BRADY MATERIAL?**

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CITATION TO OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals is published at *Hunt v. Lee*, 291 F.3d 284 (4th Cir. 2002).

JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2, these items are omitted since the State is satisfied with Petitioner's statements of Jurisdiction, and Constitutional Amendments and Statutes involved.

STATEMENT OF THE CASE

The body of Jackie Ransom was found in Lumberton, North Carolina, on September 9, 1984. An autopsy showed he died from a single gunshot wound to the head. The body of Larry Jones was discovered in a shallow grave near Fairmont, North Carolina, on October 1, 1984. Jones died from multiple gunshot wounds on the evening of September 14, 1984.

In May 1985, Petitioner Henry Lee Hunt was indicted for both murders and Angus B. Thompson, Jr. and H. Mitchell Baker were appointed to represent him. Hunt was tried at the November 18, 1985, Session of Superior Court, Robeson County, convicted of first degree murder in both cases, and sentenced to death in each case. On direct appeal, the Supreme Court of North Carolina found no error in either the guilt or sentencing phase. *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988). Hunt sought certiorari review. This Court vacated the judgments in light of *McKoy v. North Carolina*, 494 U.S. 433 (1990) and remanded to the Supreme Court of North Carolina for harmless error review of the penalty phase unanimity instruction. *Hunt v. North Carolina*, 494 U.S. 1022 (1990). On remand, the state court found the unanimity instruction harmless beyond a reasonable doubt and reinstated the judgments. *State v. Hunt*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, 505 U.S. 1226 (1992). On December 3, 1992, Hunt filed a motion for appropriate relief [MAR] in state superior court pursuant to North Carolina General Statutes 15A-1411 *et. seq*. Numerous claims were ruled procedurally barred on June

2, 1994; Hunt's petition for writ of certiorari to review that order was denied by the Supreme Court of North Carolina on August 10, 1994, *State v. Hunt,* 336 N.C. 783, 447 S.E.2d 436 (1994). A hearing was conducted on the remaining claims beginning September 12, 1994. The MAR hearing lasted approximately five weeks. On September 16, 1996, the superior court entered an order denying Hunt's remaining MAR claims. Hunt's certiorari petition to the Supreme Court of North Carolina to review the superior court's order was denied April 10, 1997. *State v. Hunt,* 345 N.C. 758, 485 S.E.2d 304, *cert. denied,* 522 U.S. 861 (1997). Hunt filed his habeas petition on April 10, 1998. The petition was denied by the United States District Court for the Eastern District of North Carolina by judgment entered on October 16, 2001. On May 23, 2002, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court. *Hunt v. Lee,* 291 F.3d 284 (4th Cir. 2002).

STATEMENT OF THE FACTS

The facts and circumstances of Hunt's crimes are succinctly stated in the opinion of the United States District Court for the Eastern District of North Carolina which summary was incorporated in the opinion of the court of appeals. (Pet. App. at 1a-6a, 42a-45a)

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. The Fourth Circuit's Disposition of Hunt's Ineffective Assistance of Counsel Claims Is Not in Conflict with Other Circuits.

Hunt claims he was denied the effective assistance of counsel guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Hunt argues he received ineffective assistance of counsel [IAC] at the sentencing phase of his capital trial because, according to Hunt, trial counsel 1) failed to present any mitigating evidence to counter the State's portrayal of Hunt as a cold - blooded contract killer; 2) conceded the existence of aggravating circumstances; and 3) relied solely on jury nullification in sentencing summation. In the first section of his petition, Hunt claims that the Fourth Circuit's opinion - which found that the state superior court's disposition of Hunt's IAC claim was not contrary to, nor an unreasonable application of, this Court's precedent - conflicts with decisions of other circuit courts. The State contends Hunt's argument is without merit.

The law applicable to Hunt's claim is well-established. In order to prevail upon his IAC claims under *Strickland*, Hunt must establish, first, that counsel's performance was constitutionally deficient, and second, that the deficient performance prejudiced the defense so as to deprive him of a fair trial. The second prong of *Strickland* requires Hunt to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 446 U.S. at 694. The burden of proving these requirements is heavy because counsel is strongly presumed to have rendered effective assistance. *Id.* With the luxury of a made record, it is wholly unremarkable that post-conviction counsel will identify areas to criticize trial counsel's actions and decisions. Such alleged shortcomings do not amount to denial of effective assistance of counsel. *Waters v. Thomas*, 46 F.3d 1506, 1513 (11th Cir. 1995).

In reviewing the procedural history of Hunt's IAC claim in the lower courts, the Fourth Circuit observed that in "[r]uling on Hunt's post-conviction MAR in a detailed 110-page opinion, the Superior Court of Robeson County considered every argument that Hunt now presents and evaluated it against the standard for ineffective-assistance-of-counsel claims, as set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)." *Hunt v. Lee*, 291 F.3d at 288. Regarding the action of the district court in Hunt's habeas proceeding, the Fourth Circuit noted "the district court concluded that 'Hunt has not established that the state court's adjudication of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, or that the state court's findings are unreasonable in light of the evidence presented.'" Noting its review is *de novo*, applying the same standard applied by the district court, *Savino v. Murray*, 82 F.3d 593, 598 (4th Cir. 1996), the Fourth Circuit clearly stated the standard of review as follows:

> The question, therefore, is whether Hunt can demonstrate that the state court's rejection of his ineffective-assistance-of counsel claim was contrary to those clearly established principles or involved an objectively unreasonable application of them. See 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 409, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). This standard is more stringent than reviewing for error or incorrectness. On habeas review, it is not sufficient in meeting the § 2254(d)(1) standard merely to find the state court's decision erroneous or incorrect; we must also find it unreasonable. *Williams*, 529 U.S. at 411.

Hunt v. Lee, 291 F.3d at 289-290.

To support his certiorari petition, Hunt first argues the Fourth Circuit's disposition of his IAC claim conflicts with an opinion of the Seventh Circuit. As a basis for this alleged conflict, Hunt focuses on trial counsel's closing argument - specifically that part related to discussion of individual mitigating circumstances - and asserts trial counsel failed to "tailor" closing argument to Hunt's specific circumstances. In presenting this claim, Hunt ignores and utterly fails to address the circumstances under which counsel was forced, as a result of Hunt's own conduct, to make his closing argument. In *Strickland*, this Court recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. 691.

This quoted language from *Strickland* surely was written with cases like the one at bar in mind. A review of the circumstances of Hunt's case is important to fully understand the situation in which trial counsel found himself going into closing argument and to put Hunt's "tailoring" claim in perspective.

The nature of the murders Hunt committed speaks volumes about Hunt's character. For instance, the Ransom murder was a contract killing which Hunt agreed to perform after only a ten minute conversation with his co-conspirator; the Jones murder was a witness elimination killing executed by Hunt to silence the mouth of Jones whom Hunt referred to as a "water headed ratting son-of-a-bitch." The Supreme Court of North Carolina and the superior court which heard Hunt's post-conviction claims both described the evidence of Hunt's guilt as overwhelming. *State v. Hunt*, 330 N.C. at 512, 411 S.E.2d at 811.

Following his arrest for the murders, Hunt's bad character continued to manifest itself. The State's evidence related to the circumstances of the killings alone was overwhelming and highly illuminating of Hunt's character, but what makes the State's evidence of guilt especially overwhelming is the evidence of Hunt's attempts, after the killings, to intimidate witnesses and destroy incriminating evidence. Hunt's family members joined with him in threatening witnesses and attempting to destroying evidence. As a result, Hunt limited viable sources of mitigating evidence available to his trial counsel in addition to producing additional incriminating evidence for the State related to Hunt's bad

character. The district court's order documents the involvement of family members in these obstruction of justice activities. (Pet. App. at 18a-19a) Ignoring his witness intimidation efforts and the hardship it caused trial counsel during their investigation of mitigating evidence and defense of his case, Hunt alleges counsel's failure to focus on his individual circumstances in closing argument resulted from an absolute failure of trial counsel to investigate and present mitigating circumstances. As noted above, Hunt's contention is soundly contradicted by the facts in the record and is myopic in its assessment of the case. A review of the alleged potential mitigating evidence proffered by Hunt at the MAR convincingly demonstrates Hunt's "failure to investigate" allegation is meritless.

To support his baseless allegation that trial counsel failed to investigate mitigating evidence, Hunt claims there were at least 20 mitigating factors that should have been presented, and that numerous witnesses were ready and willing to testify at petitioner's sentencing hearing. The facts do not bear this out. The Court of Appeals categorized these proposed circumstances, stating they "fall into five general categories relating to (1) Hunt's impoverished and violent childhood, (2) his role as a supportive and giving father, (3) his service as a dependable and hardworking employee, (4) his good behavior in prison, and (5) his existing emotional and mental disturbances." (Pet. App. at 49a)

The MAR evidence established that prior to the sentencing hearing, trial counsel investigated possible

mitigating factors, and spoke to potential witnesses. As it turned out, counsel determined **none of them** would be useful for the purpose of mitigation at the sentencing hearing largely due to Hunt's witness intimidation activities. Hunt complains trial counsel did not bring forth any evidence regarding his "impoverished and violent" childhood. While there is evidence to suggest he did have a difficult childhood, family members, an obvious source of this evidence, did not want to testify. The motion for appropriate relief hearing showed Hunt gave his attorneys false information about alibi witnesses, and his participation and that of family members in witness intimidation tactics during the guilt phase of this case. Since his family members were involved in such crimes, they would obviously be readily impeached (assuming they had been willing to give testimony). Hunt's "impoverished and violent childhood" testimony, offered either by Hunt himself, or through other family members, would also have led inevitably to cross examination regarding his criminal history which included unindicted crimes, numerous armed robberies, Hunt's dynamiting his mother's house, a brutal disembowelment in prison and drug offenses. Hunt had spent essentially all of his adult life in prison, a fact which trial counsel determined, on balance, best to keep out of the capital sentencing hearing.

Hunt's claim that proof could have been presented relative to his performance as a father was likewise problematic. The natural choice for a witness to characterize Hunt as "a supportive and giving father" would be his girlfriend, Bernice Cummings. But as it turned out, Cummings had to be put in protective custody because of her fear of Hunt.

Further, she was a witness for the State and provided highly incriminating evidence at trial. As a result of her fear of Hunt and his intimidation tactics, she refused to be interviewed by Hunt's attorneys prior to trial even though Hunt repeatedly told his attorneys she would testify for **him** at trial and would not stand by the incriminating information she had given law enforcement officers which was contained in her statements provided by the State in discovery. Cummings had been solicited to engage in witness intimidation by Hunt. Additionally, any evidence of Hunt as a good father would, of necessity, bring his quantity of prison time, and the reasons for it, to the fore, which would be deleterious to his mitigation case.

As to the possibility of evidence regarding Hunt's performance as a "dependable and hardworking employee," Hunt's counsel interviewed a former employer and concluded that such testimony would likely be a two-edged sword. Although Hunt's employer liked Hunt, and felt he was a good worker, he also was afraid of Hunt, and would testify that the reason Hunt got along with other workers was that no one at work would dare cross Hunt.

Hunt's assertion that counsel should have introduced evidence of his "good behavior in prison" is likewise flawed. Hunt's allegedly good behavior in prison would have proven an evidentiary landmine, which his trial team wisely sidestepped. Aside from the obvious fact that incarceration in prison is not really a recommendation as to a defendant's character, Hunt's behavior in prison was particularly disturbing. First, virtually

all of Hunt's witness intimidation schemes were directed from jail, evidence which allowed the reasonable inference Hunt was about as dangerous in prison as out. Next, prison records contained details of Hunt's criminal history which would have fleshed out the bare records of conviction. For example, regarding the dynamiting conviction, prison records document Hunt held a "deep resentment against his mother and Campbell (his mother's companion) and it was his heart's desire to hurt his mother and Campbell in some way." Hunt's post-conviction counsel called prison guards at the MAR supposedly to show he adjusted well to a structured environment. Their strategy failed miserably when the state brought out through a prison guard the fact Hunt had used a shank to gut a fellow inmate in prison. The witness testified that Hunt "hit [another prisoner] with a shank in the pit of his stomach . . . (and) his intestines was coming out." (Pet. App. at 52a)

Finally, Hunt complains that trial counsel should have introduced evidence from a psychiatrist regarding his emotional and mental disturbances. But that option was not available to trial counsel **because Hunt rejected the suggestion to utilize a psychiatrist.** Hunt's trial attorneys discussed with Hunt, and his sister, any psychological, mental, or substance abuse problems Hunt may have experienced. Hunt was adamant he did not want to be examined by a mental health professional. As noted in *Clanton v. Bair*, 826 F.2d 1354, 1358 (4th Cir. 1987), when a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination. *See Proffitt*

v. United States, 582 F.2d 854 (4th Cir. 1978); *Ex rel. Rivera v. Franzen*, 794 F.2d 314, 316-17 (7th Cir.), *cert. denied*, 479 U.S. 991 (1986). There is no constitutional basis for a rule that would require a psychiatric evaluation in every capital case. *See Springer v. Collins*, 586 F.2d 329, 332-33 (4th Cir. 1978), *cert. denied*, 440 U.S. 923.

Accordingly, the courts below were required to assess the trial attorneys' actions and decisions for reasonableness in light of the statements Hunt was making to them, his actions in trying to destroy evidence and quiet potential witnesses, Hunt's prior bad acts and criminal convictions, and the exposure on cross examination of all witnesses on these topics. In light of these circumstances facing trial counsel at the penalty phase of Hunt's trial, Hunt's contention that counsel "presented no argument whatsoever" regarding Hunt's individual circumstances, and that this failure to argue the case resulted from a failure to investigate potential mitigation, is patently inaccurate. Trial counsel presented argument that Hunt had a family and had no choice in the matter of his punishment. Counsel further argued that in Hunt's prior convictions there was no evidence Hunt personally used violence toward any person. (Pet. App. at 63a-65a) Strategically, trial counsel could not venture further into Hunt's individual circumstances, as a result of the nefarious facts of Hunt's background and character noted above.

In support of this petition, Hunt argues the Fourth Circuit's decision in this matter directly conflicts with the decision of the Seventh Circuit in *Hall v. Washington*, 106 F.3d

742 (7th Cir.), *cert. denied*, 522 U.S. 907 (1997). Hunt alleges trial counsel's "generalized plea for mercy" contained "no argument whatsoever that petitioner's individual circumstances did not warrant execution." (Pet. App. at 5, 11) Relying on *Hall*, Hunt argues failure to "tailor" sentencing arguments to the defendant's specific circumstances constitutes professionally unreasonable assistance. The opinion of the Fourth Circuit in Hunt's case is not in conflict with the decision in *Hall* because the facts in *Hall* are absolutely distinguishable from the facts in the case at bar. First, trial counsel in Petitioner's case did reference Hunt's individual facts in closing argument, inasmuch as it was prudent to do so in light of Hunt's abysmal record of criminal conduct prior to, and during, the trial in this case. Trial counsel did not rely solely on an all out assault on the death penalty, rather, counsel focused on issue four to urge the jury that the aggravating circumstances were not sufficiently substantial to warrant the death penalty in light of mitigating evidence. The most glaring distinction between *Hall* and the case at bar, however, is that in *Hall* the relationship between counsel and Hall was nothing short of horrible. Hall would not cooperate with counsel, he assaulted one of his attorneys, and several times petitioned the court to remove his trial counsel from his case. This animosity led to trial counsel's utter failure to independently investigate potential mitigating evidence and failure to follow leads provided by information that came to them in the course of representing Hall. As a result, the Seventh Circuit found that counsel's deficient argument - - failure to focus on individual circumstances of Hall - - in the penalty phase was due to counsel's failure to conduct a reasonably professional

investigation - - really, no investigation at all. In the case at bar, however, trial counsel conducted a professionally reasonable investigation but were stymied in their efforts by Hunt's conduct and social history. Moreover, the Seventh Circuit seemed genuinely concerned in *Hall* with the fact trial counsel reported to the court that Hall would waive a jury in the penalty phase after only consulting with Hall for 40 seconds.

In contrast, here trial counsel investigated readily available sources of mitigating evidence (Hunt, family members, and an employer), and pursued other sources (attempting to interview Hunt's girlfriend, codefendants, and other witnesses) but met roadblocks set in place by Hunt's witness intimidation tactics. In *Hall*, the attorneys did not focus on individual circumstances related to Hall because they never looked for any - - they conducted no investigation into mitigation. In Hunt's case, trial counsel investigated mitigation but trial counsel's ability to focus on individual circumstances related to Hunt was limited due to Hunt's actions, character and background. Thus, the facts of *Hall* are glaringly distinguishable from the case at bar and *Hall* does not support Hunt's contention there is any conflict in the circuit courts over penalty phase arguments in capital cases. For the reasons argued above, there is no conflict among the circuit courts on this issue and Hunt's petition to review this claim should be denied.

II. The Court of Appeals' Disposition of Hunt's Ineffective Assistance of Counsel Claim Is Not In Conflict with Decisions of This Court.

By this claim, Hunt argues trial counsel provided IAC in closing argument by relying on "general moral and religious" themes and failing to "present any legal argument cognizable in the state's sentencing scheme" in support of a verdict of less than death. (Pet. at 13) Hunt contends the Fourth Circuit's decision that the superior court's disposition of this claim was not an unreasonable application of established federal law is in conflict with decisions of this Court and thus warrants issuance of the writ. The State contends the decision below on this claim does not conflict with precedent of this Court and Hunt's claims to the contrary are without merit.

The state superior court found that "counsel's argument contained conventional themes often heard in death penalty cases and sought to present reasons to the jury why Hunt was not deserving of death." (Pet. App. at 20a) In reviewing major points of counsel's closing, the Fourth Circuit observed:

> Hunt's counsel pointed out to the jury that the prosecutor had "talked to you about death. I will talk to you about life." He then turned to the larger philosophical, moral and religious questions about life and death and requested the jury, in answering issue four on the verdict form, to find for life: "[The prosecutor], in all his grandeur, would suggest to you that Henry

> Lee Hunt should receive the death penalty and with equal grandeur, I will ask the question, 'Should he?' and I suggest to you that the answer is a resounding no . . . You know, I understand that with all of life's human failures, and recognize, that with all of life's human short comings that to impose such a penalty of death is cruel and unnecessary." Hunt's counsel then appealed for mercy for Hunt and his family: "Both Jackie Ransom and Larry Jones, I'm sure, left loved ones with tears and with sorrows. . . . You know, Henry Lee Hunt has a family, and, you know, today, Henry Lee Hunt doesn't have a choice, but you do. . . . If you want to punish Henry Lee Hunt, I suggest to let him live. You cannot punish him when he's dead." Focusing particularly on the fourth interrogatory submitted to the jury, Hunt's attorney stated: "I want you to think about whether any aggravating circumstances are sufficiently substantial for you to take this man's life in either one of those cases . . . Now, his honor will instruct you that even if you find aggravating circumstances and no mitigating circumstances, you will still have a chance to answer Issue Number Four no."

Hunt v. Lee, 291 F.3d at 293.

Relying on *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Penry v. Lynaugh*, 492 U.S. 302 (1989), Hunt argues "punishment should be directly related to the personal culpability of the defendant," and the jury "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." (Pet. at 12-13) Hunt asserts the Fourth Circuit's decision on the IAC claim related to jury argument is in conflict with *Woodson* and *Penry* because, according to Hunt, the Fourth Circuit held "North Carolina law provides juries discretion to consider general moral and religious arguments in capital sentencing." (Pet. at 13)

The simple answer to Hunt's contention is that it fails to acknowledge the full context of the Fourth Circuit's basis for affirming the district court. Hunt concedes he "never argued that it is impermissible for counsel to raise general moral and religious themes." (Pet. at 13) While acknowledging trial counsel did incorporate these themes in his argument, the Fourth Circuit also acknowledged trial counsel "elected . . . to focus on interrogatory four that allowed the jury, after weighing the factors, to find that . . . the aggravating circumstances were not sufficient to justify the death penalty." (Pet. App. at 57a) *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865 (1983) (setting forth the order and form of the issues to be submitted to the jury in capital trials). This analysis of the law was entirely correct and does not conflict with *Woodson* or *Penry*. Under N.C. GEN. STAT. §15A-2000(c) and *State v. McDougall*, after weighing aggravating circumstances against any mitigating circumstances found by

one or more of the jurors, the jury can not impose the death penalty unless it finds beyond a reasonable doubt the aggravating circumstances are sufficiently substantial, when considered together with any mitigating circumstances, to call for imposition of the death penalty. The Fourth Circuit correctly noted the focus of trial counsel's argument was issue four. Though trial counsel had investigated mitigating evidence, they made a strategic decision not to put on evidence because there was a wealth of damaging evidence which would have come before the jury related to Hunt's record and character if they opened the door. Thus, trial counsel identified the evidence to support a mitigation argument related to Hunt's individual character - Hunt being a man with a family, his robbery convictions had not been shown to have involved Hunt using violence against another person - and urged the jury to consider that evidence in deciding issue four. Consistent with *Penry,* the jury had a vehicle, N.C. GEN. STAT. §15A-2000(f)(9), the catchall mitigating circumstance, to consider the evidence, and make "a reasoned moral response to the defendant's background, character, and crime." Moreover, North Carolina law guided the sentencer's discretion by directing them in Issue Four to determine whether the aggravating circumstances in the case were sufficiently substantial to require the death penalty. To the extent the trial counsel's argument also urged mercy or sympathy for Hunt in the decision process on issue four, Hunt appears to concede this Court's precedent would not prevent a jury from considering mercy or sympathy rooted in the mitigating evidence. *Gregg v. Georgia*, 428 U.S. 153 (1976); (Pet. at 15).

Thus, contrary to Hunt's contention, trial counsel did present a cognizable legal argument in penalty phase. The focus on issue four was just such an argument. There is no conflict, therefore, between the Fourth Circuit's decision in the case at bar and this Court's precedent. In its entirety, trial counsel's argument was professionally reasonable and the superior court's determination that Hunt did not establish IAC is not an unreasonable application of federal law. For these reasons, Hunt's petition should be denied.

III. Hunt's *Brady* Claim is Without Merit.

This is the second time Hunt has brought a *Brady* claim based on the same identical evidence before this Court in a petition for writ of certiorari. Hunt's *Brady* claim based on this evidence was the subject of Hunt's petition which the Court denied in *Hunt v. North Carolina*, 522 U.S. 861 (1997). In the petition at bar, Hunt again complains that he was denied exculpatory or impeachment evidence, and now argues the court of appeals utilized too narrow a standard for determining when evidence is favorable to the accused in order to trigger *Brady's* protections. Hunt contends the court of appeals' treatment of this claim is in conflict with decisions of this Court. Specifically, Hunt argues that the state was required to disclose to Hunt that in discussions between Larry Jones (Hunt's second murder victim) and police, Jones never specifically named Hunt as Ransom's killer. Both the District Court and the Court of Appeals utilized the proper standard of review under *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514

U.S. 419 (1995); (Pet. App. at 21a-24a, 59a-60a). Contrary to Hunt's assertion, the Court of Appeals did not adopt an overly narrow view of *Brady* in affirming the action of the superior court.

In the case at bar, the failure of Jones to name Hunt as Ransom's killer to Sampson and Stogner does not exculpate Hunt. Jones was living in the same residence as Aggie Nora Hunt, Petitioner's sister, a fact she was reluctant to disclose to trial counsel. Part of the reason Aggie Nora did not want to testify at trial was she was afraid of being implicated about going to Hunt and telling him Jones had been talking to the police. Her report to Hunt on Jones' contacts with investigators was confirmed by Bernice Cummings at trial when she testified that on September 14, 1984, Aggie Nora and Annie Ruth (another sister of Hunt) came to Hunt's residence. While there, Annie Ruth and Hunt had a conversation in a back room after which Hunt emerged stating, "Jones was running his mouth and he was going to put a stop to it." Thus, the evidence shows Hunt knew Jones was being contacted by investigators and Hunt stated he believed Jones was talking to them about the Ransom murder. Hunt's own family members and friends were reporting Jones' actions to Hunt. The relevant feature of the evidence is what Hunt thought and said about Jones' contacts with law enforcement officers, not what Jones may or may not have said to Sampson and Stogner. Consequently, the evidence in question is not exculpatory as the superior court correctly found.

Moreover, the evidence does not impeach the State's theory of motive. At worst, from the State's perspective, it is neutral on the theory. It does not show Hunt did not kill Jones in order to stop Jones from "running his mouth." The State is not required by *Brady* to disclose possible theories of the defense to a defendant. If a statement or evidence is not exculpatory or impeaching, the State need not produce the evidence. To hold otherwise would impose an insuperable burden on the State to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning. *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988). As the Fourth Circuit noted, Hunt's argument regarding this evidence "overlooks the State's theory that Hunt killed Jones because Hunt *believed* that Jones was talking to the police and telling them that Hunt killed Ransom." (Pet. App. at 60a) The only thing that was important about the conversation was that it **occurred**. There is simply no view of the evidence, reading *Brady*, *Agurs* and *Kyles* as broadly as possible, that could lead a reasonable jurist to the conclusion that the content of the discussions between Jones and police were exculpatory or even useful as impeachment evidence. Moreover, in light of the overwhelming evidence of guilt and in support of the death sentences, had the content of the conversations been turned over, there is no "'reasonable probability' of a different result" *Kyles*, 514 U.S. at 434. As such, no further consideration is required. The evidence is either inculpatory or neutral. Hunt has offered absolutely no argument which makes his claim of a reasonable probability of a different result at trial even remotely plausible. Because Hunt has failed to show the court of appeals' disposition of this claim

conflicts with decisions of this Court, Hunt's petition to review this claim should be denied.

CONCLUSION

For the reasons stated herein, the Court should deny Hunt's Petition for Writ of Certiorari.

Respectfully submitted, this the 23rd day of October, 2002.

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